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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN GOODMAN,
Appellant-Petitioner,

VS.

ANGIE SHEELY,
n/k/a Angela Norton,
Appellee-Respondent,

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No. 79A02-0702-CV-144

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0604-DR-103

October 22, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Petitioner John Goodman appeals from the trial court's order granting automatic reversion of primary physical custody of his three minor children to his ex-wife, Angie Sheely, n/k/a Angela Norton, on August 1, 2007. Specifically, John contends that the trial court's order of automatic reversion of physical custody violates Indiana law as well as his parental rights of due process in custody proceedings. Concluding that the trial court erred in ordering automatic reversion of physical custody of the three minor children to Angela, we reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

John and Angela were married in July of 1991. They separated in April of 2002 and divorced on March 25, 2003. The parties are the parents of three minor children, C.G., born on June 23, 1997; K.G., born on July 6, 2001; and G.G., born on September 13, 2002. In the Decree of Dissolution, the trial court granted John and Angela joint custody of their children, placing primary physical custody with Angela and granting John visitation.

After John and Angela's divorce was finalized, John married his current wife, Anita, on March 8, 2003. Likewise, Angela remarried Shawn Sheely on October 3, 2004. Angela and Shawn separated in September of 2005 and divorced in January of 2006. Following her divorce from Shawn, Angela encountered emotional and financial difficulties. Further, allegations arose that Angela used corporal punishment on the children, leading to an investigation by the Tippecanoe County Child Protective Services.

On February 28, 2006, John filed a Petition to Modify Decree Relative to Custody and Support. On August 28, 2006, the trial court issued an order on John's petition

transferring primary physical custody of the children to John until August 1, 2007, upon which date primary physical custody would automatically revert back to Angela. The trial court ordered Angela to pay forty dollars per week to John in child support while the children were in his care and, ordered John to pay child support in the amount of \$175.00 per week upon their return to Angela's care.

On September 22, 2006, John filed a motion to correct error alleging that the trial court's automatic reversion of primary physical custody violated Indiana law. John further requested that the trial court amend the order to clarify Angela's visitation rights with the children and defer its ruling as to his child support obligations until after determining the parties' incomes for 2006. The trial court denied the motion "to the extent that it seeks to change the Court's Order as to custody," but granted the motion with respect to John's other claims. This appeal follows.

DISCUSSION AND DECISION

Generally, "we review custody modifications for an abuse of discretion, with a 'preference for granting latitude and deference to our trial judges in family law matters.'" *Van Wieren v. Van Wieren*, 858 N.E.2d 216, 221 (Ind. Ct. App. 2006) (citing *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002)). Our review of factual questions is limited to determining whether the trial court abused its discretion in applying the statutory guidelines. *Fields v. Fields*, 749 N.E.2d 100, 108 (Ind. Ct. App. 2001), *trans. denied*. We neither reweigh the evidence nor judge the credibility of the witnesses, but rather only consider the evidence most favorable to the judgment and any reasonable inferences that may be drawn therefrom. *Van Wieren*, 858 N.E.2d at 221. However, on issues

regarding questions of law, we review the trial court's ruling *de novo* and are not bound by its legal conclusions. *Thompson v. Thompson*, 868 N.E.2d 862, 864 (Ind. Ct. App. 2007); *MacLafferty v. MacLafferty*, 829 N.E.2d 938, 941 (Ind. 2005).

In an initial custody determination there is no presumption favoring either parent, but a more stringent standard governs a party's request for a change in custody. *Fields*, 749 N.E.2d at 108. "Custody may be changed only upon a showing of changed circumstances 'so substantial and continuing as to make the existing custody order unreasonable.'" *In re Marriage of Henderson*, 453 N.E.2d 310, 313 (Ind. App. 1983) (quoting *Poret v. Martin*, 434 N.E.2d 885, 888 (Ind. 1982) (concluding that the change of circumstances must be of a "decisive nature" and the change be "necessary for the welfare of the child"))).

When there is a decision by a court changing the custody of children, such a decision is in essence and effect, a judicial judgment and it cannot be changed except upon proper application, sufficient notice to the opposite part, and a full hearing of the evidence as to a change in conditions.

Henderson, 453 N.E.2d 310, 315 (Ind. App. 1983) (quoting *State ex rel. Davis v. Achor*, 225 Ind. 319, 75 N.E.2d 154, 158 (Ind. 1947)). John alleges that the trial court's automatic reversion of primary physical custody of his minor children to his ex-wife, Angela, violates Indiana law. We agree.

Under Indiana law, a trial court may not prospectively order an automatic change of custody because an automatic future custody modification violates the custody modification statute. *Bojrab v. Bojrab*, 810 N.E.2d 1008, 1012 (Ind. 2004); *see also*, Ind. Code § 31-17-2-21 (2006). A court may not modify a child custody order unless: (1) the

modification is in the best interests of the child, and (2) there is a substantial change in one or more of the factors, set forth in Indiana Code section 31-17-2-8.¹ Ind. Code § 31-17-2-21 (2006); *Van Wieren*, 858 N.E.2d at 821. Further, “[a] petitioner seeking modification of a child support order bears the burden of demonstrating that the existing custody arrangement should be altered.” *Van Wieren*, 858 N.E.2d at 221.

In the instant matter, the trial court issued an order on August 28, 2006, granting John primary physical custody of his and Angela’s minor children after concluding that this would be in the best interest of the minor children. However, this same order stated that primary physical custody of the children would automatically revert back to Angela on August 1, 2007. The trial court’s order did not require a hearing on the matter prior to

¹ Indiana Code section 31-17-2-8 provides:

The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:

- (1) The age and sex of the child.
- (2) The wishes of the child’s parent or parents.
- (3) The wishes of the child, with more consideration given to the child’s wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child’s parent or parents;
 - (B) the child’s sibling; and
 - (C) any other person who may significantly affect the child’s best interests.
- (5) The child’s adjustment to the child’s:
 - (A) home;
 - (B) school; and
 - (C) community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic or family violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

this transfer of primary physical custody. Further, it did not require any showing of a significant change in the factors outlined above in Indiana Code section 31-17-2-8, nor did it require any showing by Angela that she had satisfactorily improved her ability to care for the children's emotional and physical well-being.

Given the precedent that a trial court may not order automatic changes in custody and the above statutory considerations which must be made before any such change in custody occurs to ensure that the children's best interests are being met, we conclude that the trial court's order automatically transferring primary physical custody of the minor children back to Angela was impermissible under Indiana law.² We therefore reverse the trial court's order granting an automatic transfer of primary physical custody to Angela on August 1, 2007, and remand this matter to the trial court for a hearing to determine whether a substantial change in circumstances warrants modifying the children's placement with John. Primary physical custody of the children shall remain with John pending the conclusion of the hearing, and Angela, as the petitioning party, bears the burden of proving that alteration of the existing custody arrangement is warranted. In the event that the August 1, 2007 automatic transfer order took effect, and the children have been returned to Angela's custody, we order primary physical custody of the children to be placed with John pending the outcome of the aforementioned hearing.

The judgment of the trial court is reversed, and this cause is remanded with instructions.

² Since we conclude that the trial court's order automatically modifying custody is impermissible under Indiana law, we need not consider John's argument relating to his parental due process rights.

NAJAM, J., and MATHIAS, J., concur.